Supreme Court, U.S.
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No. 00-973

IN THE

SUPREME COURT OF THE UNITED STATES

JANUARY TERM 2001

UNTIED STATES OF AMERICA, PETITIONER

vs.

ALPHONSO VONN, RESPONDENT

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The Respondent, Defendant, by his undersigned counsel, asks leave to file the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, without prepayment of costs and to proceed in forma pauperis. The Office of the Federal Public Defender, by Deputy Federal Public Defender Derek Li, was appointed as counsel for Defendant in the trial court under the Criminal Justice Act, 18 U.S.C. § 3006A(b).

* * *

This motion is brought pursuant to Rule 39.1 of the Rules of the Supreme Court of the United States.

Respectfully submitted,

MARIA E. STRATTON
Federal Public Defender

EMILY S. UHRIG
Deputy Federal Public Defender

DATED: January 26, 2001

EMILY S. UHRIG
Deputy Federal Public Defender

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UNITED STATES OF AMERICA, PETITIONER

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ALPHONSO VONN, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO GRANTING OF PETITION FOR A WRIT OF CERTIORARI

MARIA E. STRATTON
Federal Public Defender
EMILY S. UHRIG
Deputy Federal Public Defender
321 East 2nd Street
Los Angeles, California 90012-4202
Telephone (213) 894-7330

Attorneys for the Respondent

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 224 F.3d 1152 (9th Cir. 2000) (J. Kozinski). The first opinion of the court of appeals, which was withdrawn on rehearing (Pet. App. 11a-22a), is reported at 211 F.3d 1109 (9th Cir. 2000).

JURISDICTION

The initial judgment of the court of appeals was entered on April 20, 2000. The judgment of the court of appeals on rehearing was entered on September 14, 2000. This Court has jurisdiction under 28 U.S.C. § 1254(1).

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

The government seeks certiorari on issues that it never litigated before the court of appeals and thus that Judge Kozinski's opinion never considered. Specifically, the government never argued on appeal that the court of appeals should evaluate Rule 11(c)(3) errors raised for the first time on appeal for plain error under Federal Rule of Criminal Procedure 52(b), rather than for harmless error under Rule 11(h). Instead, the government agreed that the court of appeals should evaluate such errors -- specifically, the Rule 11(c)(3) errors in respondent's guilty pleas to bank robbery and conspiracy -- for harmlessness under Rule 11(h). With respect to respondent's § 924(c) conviction, the government argued only that respondent had waived altogether the right to challenge his plea under Rule 11(c)(3) by not including that claim in the motion to withdraw his plea to that count that he made before sentencing. The government did not urge the court of appeals to apply plain error review.

Likewise, the government agreed with respondent that, to evaluate whether a Rule 11(c)(3) error is harmless under Rule 11(h), the court of appeals must assess whether the

defendant was otherwise aware of the constitutional right of which the district court failed to inform him at the time he pled guilty. Thus, the government's argument in its petition for certiorari -- that Rule 11(c)(3) errors raised for the first time on appeal should be evaluated for plain error under Rule 52(b) and that the proper test for assessing harmless error is to determine whether the error affected the defendant's decision to plead guilty -- directly conflicts with the positions it advocated before the court of appeals.

As a result, Judge Kozinski's opinion for the court of appeals never considered -- and thus provides no analysis on -- the applicability of a plain error standard of error and the definition of harmlessness under Rule 11(h), which the government now raises for the first time in its petition for certiorari. Accordingly, the issues were not properly preserved and developed and this case is not an appropriate one for Supreme Court review.

Moreover, the apparent circuit split the government identifies regarding the standard of review for Rule 11 errors first raised on appeal is of little effect. Regardless of whether the circuits attach plain error or harmless error to their analysis, the inquiry remains substantively the same: Does the record demonstrate that, despite the error, the defendant's plea was both knowing and voluntary? If the court of appeals cannot satisfy itself in the affirmative, in every circuit, it will vacate the plea and remand the case.

In addition, the government overstates the breadth of Judge Kozinski's opinion with respect to the scope of the court of appeals' review in assessing the harmlessness of Rule 11 errors. The court of appeals did not hold that in assessing the harmlessness of all Rule 11 errors, such as a defendant's knowledge of the potential consequences of his plea, it is limited to the plea colloquy. Indeed, such a holding would conflict with other, well-established Ninth Circuit

precedent and Rule 11's own advisory committee notes, which permit appellate assessment of all temporally relevant proceedings in evaluating the harmlessness of a Rule 11 error. Rather, the court of appeals held only that it is limited to the record of the plea proceeding in assessing whether a defendant was otherwise aware of a constitutional right of which the district court failed to advise him under Rule 11(c)(3). That is, all that is relevant in assessing whether a defendant knowingly relinquished his constitutional right to assistance of counsel at trial when he pled guilty is whether the defendant was aware of that right at the time of his plea, not months before or months later.

In light of the court of appeals' limitation of its holding to Rule 11(3)(3) errors -- that is, deficiencies in the constitutional advisements -- its decision in Vonn does not create a split between the Ninth and other circuits. Hence, the cases cited by the government in its petition to demonstrate a circuit split are inapposite.

Finally, the Ninth Circuit's decision in Vonn is too fact-specific to have ready application to other Rule 11 cases. This case lacks the traditional posture of Rule 11 appeals where a defendant challenges a conviction for the first time on appeal. Rather, two plea colloquies are at issue, to three counts, respectively, as well as a motion to withdraw a guilty plea to one of the counts to which respondent pled at the second proceeding. Indeed, part of the court's analysis -- its rejection of the government's waiver argument -- derives from the fact that respondent moved to withdraw his guilty plea to the firearm count. Moreover, in the second plea proceeding, the government actually objected to, and thus brought to the court's attention, the deficiency in the court's constitutional advisement under Rule 11(c)(3). Thus, the traditional rationale for applying plain error review is not at issue in this case: the government was not prejudiced by

respondent's failure to object because its objection gave the court the opportunity -- which it rejected -- to correct the error. The case is therefore not appropriate for Supreme Court review.

STATEMENT OF THE CASE

On March 14, 1997, respondent was charged in a two-count indictment with armed bank robbery, in violation of 18 U.S.C. § 2113(a)(d), and using and carrying a firearm during and in relation to that robbery, in violation of 18 U.S.C. § 924(c), respectively. Resp. C.A. Ex. Rec. 1-3. Two months later, on May 12, 1997, through court-appointed counsel, he informed the court that he wished to plead guilty to the bank robbery count but would go to trial on the firearm count. Resp. C.A. Ex. Rec. 12. Before accepting his guilty plea to the bank robbery, the court questioned respondent pursuant to Federal Rule of Criminal Procedure 11 but failed to advise him of his right to assistance of counsel at trial, as required by Rule 11(c)(3). Id. at 3-13. The court then continued the matter for sentencing on the bank robbery, and for trial on the remaining firearm count. Id. at 20-21.

On July 29, 1997, the government filed a superseding indictment, which charged respondent with one count of conspiracy to commit bank robbery, in violation of 18 U.S.C. § 371; one count of armed bank robbery and aiding and abetting, in violation of 18 U.S.C. §§ 2113(a) (d) and 2(a); and one count of using and carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c). Id. at 4-9, 72. On September 3, 1997, respondent appeared before the district court to enter guilty pleas to the conspiracy and firearm counts. Id. at 25. In advising respondent of the constitutional rights he would waive by pleading guilty, the district court again failed to inform him of his right to assistance of counsel at trial. Id. at 29-30. This time, the government objected to the court's omission, stating that it did not

"remember hearing the Court inform the defendant of his right to assistance of counsel." Id. at 32-33; Pet. App, at 3a. The court replied: "I didn't because [he] is represented by counsel," id. at 33; Pet. App, at 3a, and thereupon accepted the guilty pleas to the conspiracy and § 924(c) charges.

On May 14, 1998, respondent moved to withdraw his guilty plea to the § 924(c) charge only, arguing that the plea lacked a factual basis. Resp. C.A. Ex. Rec. 58-59. The district court denied the motion. Id. On June 22, 1998, respondent was sentenced to 97 months' in prison. Pet. App., at 23a-24a.

On appeal, respondent challenged the validity of his guilty pleas on all three counts, in relevant part, on the ground that the district court erred under Rule 11(c)(3) by failing to ensure his understanding and voluntary waiver of his right to assistance of counsel at trial before accepting his guilty plea. Resp. C.A. Br. 15-21. With respect to the § 924(c) conviction, the government argued that respondent had waived his right to appeal the court's failure to advise him of his right to assistance of counsel at trial under Rule 11(c)(3) because he had not raised that issue in the motion to withdraw his plea that he filed with the district court. Pet. C.A. Br. at 18-21; Gov't C.A. Pet'n for Reh'g. at 7. The government urged the court of appeals to review the Rule 11(c)(3) errors pertaining to respondent's bank robbery and conspiracy convictions for harmless error under Rule 11(h). Pet. C.A. Br. at 22-43; Gov't C.A. Pet'n for Reh'g. at 8-11. The government noted that "Rule 11(h) was designed to import ordinary harmless error analysis, from Federal Rule of Criminal Procedure 52(a), into the Rule 11 context." Pet. C.A. Br. at 25. At no time did the government argue that the court of appeals should assess the Rule 11(c)(3) violations for plain error under Rule 52(b).

Moreover, the government agreed with respondent that the test for whether a Rule 11(c)(3) error is in fact harmless under Rule 11(h) is whether the record reveals that the "defendant had knowledge of the right about which the court failed to give notice." Pet. C.A. Br. at 33. See also id at 23, 34-43. At no time did the government argue, as it does now in its petition for certiorari, that the test for harmlessness should be whether the defendant still would have pled guilty if he had received the proper advisement. Instead, the government argued that the district court's failure to advise respondent of his right to assistance of counsel at trial before accepting his guilty pleas to all three counts was harmless error under Rule 11(h) because the record as a whole evinced his understanding of that right.

The court of appeals vacated the pleas and remanded the case for further proceedings. In so ruling, the court rejected the government's argument that respondent had waived his right to object to the adequacy of the constitutional advisements regarding his § 924(c) plea by not raising that objection in his motion to withdraw that plea. The court noted that Rule 11(h)'s harmless error test "supersedes the normal waiver rule" that precludes appellate review of issues raised for the first time on appeal. Pet. App. 15a. The court of appeals further noted the anomaly that would result if it accepted the government's position on appeal: "We would be precluded from considering the failure to caution defendant of his right to counsel on the gun charge, as to which he made a motion to withdraw the plea (but failed to raise the rule 11 argument), but we would not be precluded from considering the issue with respect to the remaining counts, as to which the defendant made no motion to withdraw the plea." Id. at 15a n.2.

With respect to respondent's Rule 11 challenges to his bank robbery and conspiracy convictions, the court of appeals did not take issue with the parties' position that those errors are

subject to harmless error analysis under Rule 11(h). Id. at 15a-22a. Thus, the court evaluated the Rule 11(c)(3) errors pertaining to all three guilty pleas for harmlessness error under Rule 11(h), which requires the court to "disregard variances from the colloquy that do not 'affect substantial rights.'" Id. In so assessing, the court applied the test as to whether respondent's substantial rights were affected that both the government and respondent urged: Was respondent otherwise aware of his right to assistance of counsel at trial despite the district court's failure to advise him of that right? Id. The court concluded that the record as a whole did not establish respondent's understanding of that right. Id. Therefore the district court's errors were not harmless. Id. at 22a.

The government filed a petition for rehearing and moved to supplement the record to include transcripts of respondent's initial appearance and arraignment proceedings at which he, together with all other defendants arraigned on that date, had been advised of his constitutional rights, including the right to assistance of counsel at trial, and an acknowledgment of his constitutional rights that he had signed at his arraignment. Gov't C.A. Pet. for Reh'g 1-11. The government argued the additional proceedings revealed respondent's knowledge of his right to assistance of counsel at trial at the time of his guilty pleas, two and six months later, respectively. Gov't C.A. Pet. for Reh'g 8-11. Respondent opposed the rehearing petition on the ground that the previous proceedings were irrelevant in assessing his understanding of his right to assistance of counsel at trial at the time he pled guilty to the charges months after those proceedings. Opp. to Gov't Pet. for Reh'g 4-13. Respondent argued that, in evaluating whether a defendant understood a constitutional right of which the district court failed to advise him at his plea proceeding, the court of appeals should be limited to the record of the plea proceeding. Id.

In its petition for rehearing, once again, the government did not challenge the court of appeals' application of Rule 11(h)'s harmless error analysis to Rule 11 errors raised for the first time on appeal. Nor did the government take issue with the court of appeals' understanding of what that inquiry entails: that a defendant's substantial rights are affected by an error under Rule 11(c)(3) -- and hence, that error is not harmless -- where he is not otherwise aware of the constitutional right he is waiving by pleading guilty, of which the district court fails to advise him.

The court of appeals withdrew its opinion and issued a revised one, which again vacated respondent's guilty pleas based on the Rule 11(c)(3) deficiencies. Pet. App. 1a-10a. The court left intact its analysis regarding the applicability of Rule 11(h)'s harmless error provision to plea colloquy deficiencies raised for the first time on appeal, in particular, where a defendant moved to withdraw his guilty plea but did not raise that error. Likewise, consistent with both parties' position throughout the appeal, the court again noted that the harmless error inquiry required it to assess "whether the defendant was aware of his rights despite the judge's failure to advise him." Id. at 6a.

But the court of appeals agreed with respondent that, for purposes of harmless error analysis, "[i]n determining what the defendant knew" regarding his right to assistance of counsel at trial, it was "'limited to what the record of the plea proceeding contains.'" Pet. App. 6a (quoting United Stated v. Graibe, 946 F.2d 1428, 1435 (9th Cir. 1991)). The court concluded that neither plea proceeding revealed respondent's understanding of his right to assistance of counsel at trial despite the district court's failure to advise him of that right. Id. at 7a-9a. Thus, the errors in both plea proceedings were not harmless. Id. at 10a.

DISCUSSION

1. THE GOVERNMENT SEEKS REVIEW OF ISSUES NOT PROPERLY PRESERVED IN THE COURT OF APPEALS.

The government asks this Court to review whether the court of appeals erred by evaluating the district court's failure to advise respondent regarding his relinquishment of his right to assistance of counsel at trial, as required by Rule 11(c)(3), under Rule 11(h)'s harmless error test, rather than under the plain error test set forth under Federal Rule of Criminal Procedure 52(b). Cert. Pet. at 12-16. Yet, the government never argued to the court of appeals that Rule 52(b)'s plain error test should be applied in evaluating whether the Rule 11(c)(3) errors at issue warranted vacation of the pleas. Pet. C.A. Br. at 18-45; Gov't C.A. Pet'n for Reh'g at 8. Indeed, with respect to respondent's guilty pleas to the bank robbery and conspiracy counts, the government argued the reverse: that the court of appeals should review those errors for harmlessness under Rule 11(h). Pet. C.A. Br. at 22-45; Gov't C.A. Pet'n for Reh'g at 8. With respect to respondent's guilty plea to the § 924(c) count, the government argued only that respondent had waived his right to appeal the validity of his guilty plea to the § 924(c) count by not raising the issue in a motion to withdraw that plea filed before sentencing and thus, that the court of appeals was barred from considering the argument at all. Pet. C.A. Br. at 18-21. See United States v. Olano, 507 U.S. 725, 733 (1993) (distinguishing waiver from forfeiture, noting "forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right'") (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)). Thus, at no time did the government argue that the court of appeals should evaluate

the errors under Rule 52(b)'s plain error test.[1] As a result, the court of appeals never had the opportunity to address the arguments the government now raises in its petition for certiorari. Thus, the record is not adequately developed on this issue and this case is not an appropriate vehicle for the Court's review.

Similarly, the government argues that the court of appeals erred by defining a Rule 11(c)(3) error as harmless under Rule 11(h) only where the plea colloquy record reveals that the defendant was otherwise aware of the constitutional right of which the district court failed to inform him. The government urges this Court to grant certiorari in order to adopt the Fifth Circuit's definition of harmless error articulated in United States v. Cuevas-Andrade, 232 F.3d 440 (2000). Specifically, the Fifth Circuit has held that, for purposes of harmless error review, "a defendant's substantial rights are affected if the district court's Rule 11 errors may reasonably be viewed as a material factor affecting the defendant's decision to plead guilty." Cuevas-Andrade, 232 F.3d at 443 (brackets and internal quotations omitted). But again, this position directly conflicts with the position the government advocated before the court of appeals, which Judge Kozinski's opinion ultimately adopted. See Pet. C.A. Br. 23 (Rule 11(c)(3) error "harmless if the record demonstrates that the defendant was aware of the necessary information at the time he entered his plea") (internal quotations omitted); Gov't C.A. Pet'n for Reh'g 8-9 ("the relevant inquiry is whether the defendant was aware of his rights despite the judge's failure

[1] In its petition for certiorari, the government argues that "[e]qually clearly, the court rejected the government's contention that respondent's failure to raise the claim in the district court amounted to a waiver (or, more accurately, a forfeiture) of that claim." Cert. Pet. 14. This assertion misrepresents the record: The government never asked the court of appeals to evaluate the district court's Rule 11(c)(3) errors for plain error under Rule 52(b). Thus, there was no "contention" to reject.

to advise him") (brackets omitted). Thus, once again, the court of appeals was deprived of the opportunity to consider the arguments the government now raises in its petition for certiorari.

Moreover, in the context of a Rule 11(c)(3) error, the government urges a distinction without a difference. In short, where the record does not reveal that a defendant understood he had the right to assistance of counsel at trial at the time he relinquished his right to trial by pleading guilty, a reviewing court cannot determine that the defendant would have pled guilty if he had understood that right. This is true because it would be impossible to ascertain that knowledge of such a crucial constitutional right would not have affected a defendant's decision to waive his right to trial.[2] For example, a defendant may believe he has a viable defense to the charges at issue but would be unable to present that defense to the court without the assistance of counsel. Under that circumstance, in effect, the defendant's plea would be coerced by his lack of knowledge of his right to counsel at trial. The only way that a court of appeals can be certain that the defendant's decision to plead guilty was unaffected by the district court failure to advise him of his right to assistance of counsel at trial is to determine that the defendant was otherwise aware of that right. Thus, in the context of the Rule 11(c)(3) error at issue in this case, the two standards for defining harmless error reduce to the same analysis.

[2] The government contends that "there may well be circumstances in which a court could conclude that the defendant was sufficiently determined to plead guilty even in the absence of the specific information omitted from the Rule 11 colloquy." Cert. Pet. 17 n.9. Interestingly, the government offers no examples of such a scenario. Indeed, such a scenario becomes utterly implausible in the context of the crucial role a defendant's knowledge of his right to assistance of counsel at trial plays in any decision to exercise the right to trial or to plead guilty.

2. THE CIRCUIT SPLIT REGARDING THE STANDARD OF REVIEW THAT APPLIES TO RULE 11 ERRORS RAISED FOR THE FIRST TIME ON APPEAL IS MISLEADING BECAUSE THE ANALYSIS APPLIED BY THE CIRCUITS IS VIRTUALLY IDENTICAL, REGARDLESS OF THE STANDARD OF REVIEW.

The government's petition contends that Judge Kozinski's opinion in Vonn "contributes to an existing circuit conflict on a question of significant and recurring importance to the federal criminal justice system." Cert. Pet. 11. The government contends that the First, Sixth, Seventh, and Eleventh Circuits apply plain error review to Rule 11 errors raised for the first time on appeal; (citing United States v. Gaudia-Maysonet, 227 F.3d 1, 5-6 (1st Cir. 2000); United States v. Bashara, 27 F.3d 1174, 1178-79 (6th Cir. 1994), cert. denied, 513 U.S. 1115 (1995); United States v. Cross, 57 F.3d 588, 590 (7th Cir.), cert. denied, 516 U.S. 955 (1995); United States v. Quinones, 97 F.3d 473, 475 (11th Cir. 1996)); and the Fifth, Ninth, and D.C. Circuits apply harmless error analysis, United States v. Odedo, 154 F.3d 937, 940 (9th Cir. 1998); United States v. Lyons, 53 F.3d 1321, 1322 n.1 (D.C. Cir. 1995); United States v. Glinsey, 209 F.3d 386, 394 n.8, cert. denied, 121 S. Ct. 282 (2000). Cert. Pet. 12-13.

But the government greatly overstates the nature and significance of this apparent difference in approach because, regardless of the standard attached to their respective analyses, in substance, all of the circuits conduct the same inquiry in assessing whether a Rule 11 error warrants reversal. This results from the unique appellate considerations involved in resolving a Rule 11 error, whether or not it is raised for the first time on appeal. Specifically, courts of appeals recognize that Rule 11 instructs the district courts in clear, specific terms to ensure the knowing and voluntary nature of guilty pleas. Where district courts are deficient in their

responsibilities under Rule 11, courts of appeals conduct a very fact-specific analysis to determine whether, despite the error, the defendant's decision to plead guilty was informed and voluntary. Where the record cannot provide such an assurance, the courts of appeals do not hesitate to vacate the plea in its entirety or remand the case for resentencing consistent with the advisements regarding the potential consequences of the plea that the defendant received when his plea was entered.

By their terms, Rule 11(h)'s harmless error provision and Rule 52(b)'s plain error provision set forth distinct standards of review. See Olano, 507 U.S. 725; Odedo, 154 F.3d at 940. Rule 11(h) derives from Rule 52(a), which provides that "any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." Fed. R. Crim. P. 52(b); Fed. R. Crim. P. 11(h), 1983 advisory committee notes. Rule 11(h) in turn provides that "[a]ny variance from the procedures required by [Rule 11] which does not affect substantial rights shall be disregarded." The government has the burden of establishing that such an error does not affect a defendant's substantial rights. See Odedo, 154 F.3d at 940. Rule 52(b)'s plain error analysis, on the other hand, allows a court of appeals to address an error that was not raised in the district court where the error is plain and affects the defendant's substantial rights. Olano, 507 U.S. at 732-734. Rule 52(b)'s inquiry is the same as that required for harmless error analysis except that "[i]t is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." Id. at 734-35.

But as applied in the Rule 11 context, whether described as plain or harmless error review, the circuits follow the same approach in assessing whether an error warrants vacating a guilty plea. In each case, the courts conduct a very fact-specific inquiry to determine whether the

record shows that the Rule 11 error compromised the knowing and voluntary nature of the plea by impacting the defendant's decision to plead or, in the case of a failure to advise a defendant of a constitutional right he waives by pleading, by depriving the defendant of knowledge of his waiver of that right. Indeed, the circuits tend to speak of "the record" in objective terms, as opposed to turning its analysis on who carries the burden of persuasion. The cases cited by the government as evidence of the supposedly different standards applied, in fact, best illustrate the commonality of the circuits' approach.

In Bashara, 27 F.3d 1174, the Sixth Circuit reviewed a Rule 11 challenge to a district court's failure to advise a defendant at his plea proceeding that he would face a five-year mandatory minimum prison term. The court stated it would review the case for plain error but then applied a straight, fact-specific Rule 11(h) analysis without mention of the defendant's apparent burden of persuasion. Id. at 1178-80. The court affirmed, finding that "under the totality of the circumstances of this case, [it could] not say that Bashara's substantial rights were violated by the district court's error when it neglected to advise him that he faced a minimum prison sentence of five years." Id. at 1180.

The Seventh Circuit conducted the same analysis in the Cross case; although it stated that it would review the Rule 11 error at issue for plain error, the court was silent regarding the defendant's apparent burden of persuasion in assessing whether the error was harmless under Rule 11(h), that is, whether the facts of the case compromised -- and hence warranted vacating -- the plea. Cross, 57 F.3d 588. Again, the court concluded that "[b]ecause the totality of the circumstances surrounding [the defendant's] plea shows that he tendered the plea of guilty voluntarily and without coercion, the district court's omission constituted harmless error." Id. at

588. See also Quinones, 97 F.3d 473, 475 (11th Cir. 1996) (applying plain error review of Rule 11 challenge based on failure to advise of nature of charge but vacating plea because "district court failed to satisfy the core objective that [the defendant] understand the nature of the charge against him").

The First Circuit adopts a somewhat different approach to evaluating Rule 11 errors raised for the first time on appeal. See Gandia-Maysonet, 227 F.3d 1 (1st Cir. 2000). In Gandia-Maysonet, the court of appeals reviewed a Rule 11 error raised for the first time on appeal for plain error but noted that it had to find not only that the defendant's substantial rights are affected but also that "the error has 'seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings.'" Id. at 5. Nonetheless, the court underscores that "[i]n the taking of a guilty plea under Rule 11, the critical concerns are that the plea be voluntary and that there be an admission, colloquy, proffer, or some other basis for thinking that the defendant is at least arguably guilty." Id. at 6. Thus, the court vacated the plea where the defendant had not been properly advised of the requisite scienter standard governing his offense. Id. at 6-7.

The cases that assess Rule 11 errors raised for the first time on appeal for harmless error reveal a remarkably similar inquiry.[3] In Odedo, 154 F.3d at 939, the Ninth Circuit emphasized

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[3] Many courts analyze Rule 11 errors raised for the first time on appeal under Rule (h)'s harmless error provision without even considering that plain error review might apply but, at the same time, without even mention of the government's burden of persuasion. Instead, the courts review the record to determine whether the error at issue compromised the knowing and voluntary nature of the guilty plea.

Indeed, in Vonn, the Ninth Circuit never stated that the government had the burden of persuasion on this issue. Cert. Pet. 6a. Nor, as discussed infra, did the court ever assess the possibility that plain error analysis should apply. Id. Instead, the court of appeals vacated respondents' guilty pleas because there was no showing on the record that he understood his right

that "Rule 11 places the obligation on the district judge to comply with the requirements of the rule in order to assure that the plea is knowing and voluntary. It is not a provision that requires the defendant to request the judge to make the inquiry or specify its form. Rule 11 provides the form of the inquiry that the judge is required to give." Thus, the court of appeals concluded that Rule 11(h)'s harmless error test applies to all Rule 11 errors, regardless of whether they were raised before the district court. Id. But in assessing the harmlessness of the error -- failure to advise the defendant of the nature of the charges under Rule 11(c)(1) -- the court again assessed the factual content of the record, in so doing concluding that there was no basis for finding that the defendant otherwise understood the charges to which he pled guilty. Id.

Similarly, in Lyons, 53 F.3d 1321, the D.C. Circuit considered the defendant's Rule 11 challenge to the district court's erroneous advisement during the plea colloquy of the potential

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to assistance of counsel at trial at the time he relinquished his right to trial by pleading guilty to the charges. Id. at 7a-10a.

Similarly, in United States v. Livorsi, 180 F.3d 76, 78-82 (2d Cir. 1999) , the Second Circuit assessed Rule 11 challenges raised for the first time on appeal for harmless error without mention of the applicability of plain error review. The defendant challenged the validity of his guilty plea based on the district court's failure to (1) advise him under Rule 11(e)(2) that, if the court rejected the government's recommendation under a plea agreement, he would be unable to withdraw his plea on that basis; and (2) inquire into whether he was on any medication or under a physician's care. Id. at 78-82. The court noted that a provision in a plea agreement advising the defendant of his inability to withdraw his plea should the court reject the recommendation suggested his awareness of this information. Id. at 81-82. At the same time, the defendant proffered the fact that he had been taking medication for several years due to a head injury and periodically suffered blackouts and amnesia. Id. at 82. In their aggregate, Second Circuit concluded the errors were not harmless. Thus, despite the fact that "plain error" was never part of its analysis, by viewing the evidence proffered by the defendant regarding his medical condition as critical to its decision to vacate the plea, the court implicitly held him to some burden of persuasion.

fine he would face by pleading guilty. (Despite the court's advisement of a $250 maximum fine, the actual maximum was $250,000 and it ultimately imposed a $135,000 fine. Id. at 1321.) In a footnote, the court of appeals noted that the absence of a contemporaneous objection did not trigger plain error analysis; rather, it would assess the error under Rule 11(h). Id. at 1322 n.1. But at the same time, the court's analysis in no way turned on who bore the burden of proof. Instead, in affirming after assessing the specific facts of the case, the court stated "[b]ecause the record as a whole makes clear that [the defendant] was not in fact misled, the error was not prejudicial and therefore not cause for reversal." Id. at 1322.

And in Glinsey, 209 F.3d at 394, the Fifth Circuit noted that it assesses Rule 11 errors raised for the first time on appeal for harmlessness under Rule 11(h), rather than plain error. But in its analysis of the actual harmlessness of the error at issue, the court implicitly placed the burden of persuasion on the defendant by requiring him to "show that the district court's variance affected his substantial rights." Id. at 394. Again, the court evaluated the facts to determine whether the error affected the defendant's decision to plead: he pled after being advised of the possibility of $1 million in fines but no receiving no warning regarding restitution; the court ultimately imposed restitution in excess of $1 million. Id. at 394-95. The Fifth Circuit reduced the restitution order to $1 million and concluded that his substantial rights were thus unaffected. Accordingly, regardless of the standard of review stated at the outset of its analysis, the court of appeals did what the other circuits have done: evaluated the record to determine whether the Rule 11 deficiency may have affected the defendant's decision to plead guilty.

In any event, despite the limited effect the differing standards of review have on the circuits' assessment of Rule 11 appeals, Judge Kozinski's opinion in Vonn follows the better rule

of law. (Again, despite the position it now takes in its petition for certiorari, the government never argued or even suggested to the court of appeals that plain error review should apply. See infra at 1-2, 5-8.) Rule 11's advisory committee notes make clear Congress's intent that appellate courts apply Rule 11(h) to any deficiency in a plea proceeding, regardless of whether the defendant objects to that deficiency before the court accepts his guilty plea. Specifically, Rule 11 adopts Rule 52(a)'s harmless error analysis as Rule 11(h). Most Rule 11 appeals raise deficiencies in guilty plea proceedings to which the defendant did not object in the district court.[4] Yet, despite Rule 11(h)'s extensive advisory committee notes, there is no reference to a defendant's need to make a contemporaneous objection to a Rule 11 error in order to invoke Rule 11(h)'s harmless error analysis. Likewise, the notes do not suggest that plain error review will apply where the defendant fails to make such an objection. If Congress had intended the courts to apply plain error analysis to these errors, it would have imported the text of Rule 52(b) as well as Rule 52(a) into Rule 11's provisions.

But regardless of the standard of review attached to the circuits' review of Rule 11 errors raised for the first time on appeal, courts are conducting the same analysis. Hence, Supreme Court resolution of this issue would not have a significant impact on appellate review of Rule 11

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[4] Indeed, respondent's case is an anomaly in this regard in that the government actually objected in the second plea proceeding to the district court's failure to advise respondent of his right to assistance of counsel at trial. Thus, the district court was on notice that its advisements were deficient. The court nonetheless misapprehended the requirements of Rule 11(c)(3) and concluded that respondent did not need to be advised of his "right to counsel" because he was already represented by counsel. Pet. App. 3a. More typically, where there is an objection to the integrity of a guilty plea, it is made after the plea is accepted, by a defendant's motion withdraw the guilty plea pursuant to Federal Rule of Criminal Procedure 32(e). See, e.g., United States v. Jones, 143 F.3d 1417, 1418 (11th Cir. 1998); United States v. Maher, 108 F.3d 1513, 1520 (2d Cir. 1997); United States v. Still, 102 F.3d 118, 123 (5th Cir. 1996).

errors raised for the first time on appeal. The government's petition for review on this issue should be denied.

3. THE GOVERNMENT OVERSTATES THE HOLDING IN VONN WITH RESPECT TO THE PROPER SCOPE OF APPELLATE REVIEW OF RULE 11 ERRORS; ANY EXISTING CIRCUIT SPLIT IS EXTREMELY SHALLOW

The government argues that the Ninth Circuit in Vonn "held that, in considering whether a Rule 11 error 'affect[ed] substantial rights' a reviewing court is confined to the four corners of the transcript of the plea colloquy proceeding, at least on direct appeal." Cert. Pet. 18. Based on that reading, the government then asserts that the court of appeals decision conflicts with "every other circuit that has considered this issue," which have "held that the transcript of the plea colloquy is but one part of the record that may be considered in assessing whether a Rule 11 error affected the defendant's substantial rights." Cert. Pet. 19 (citing Jones, 143 F.3d at 1420; United States v. Lovett, 844 F.2d 487, 492 (7th Cir. 1988); Maher, 108 F.3d at 1520-24; Lyons, 53 F.3d at 1322-23; United States v. Johnson, 1 F.3d 296, 302 (5th Cir. 1993) (en banc)).

Both contentions are wrong and divorce the language of Judge Kozinski's opinion from the context of the case, that is, the particular Rule 11 error at issue in Vonn. As discussed, the court of appeals faced only the question of the scope of its review in assessing the harmlessness of a district court's failure to advise a defendant of his right to assistance of counsel at trial, as required by Rule 11(c)(3). For the inquiry, the court held that only the contents of the plea proceeding are relevant. In short, what matters is not what the defendant may have understood months before or after he pled guilty but what he understood at the time he entered that plea and waived his right to trial. Pet. App. 6a-7a.

The court of appeals did not hold that the same limited scope applies to its assessment of the harmlessness of all Rule 11 errors. Indeed, such a holding would directly conflict with other Ninth Circuit precedent and the instructive language of Rule 11's advisory committee notes. See, e.g., United States v. Crawford, 169 F.3d 590 (9th Cir. 1999) (evaluated both plea and sentencing proceedings in concluding court's failure to advise defendant of mandatory restitution harmless error where defendant advised of possible fine in excess of amount of restitution actually ordered at sentencing); United States v. Chan, 97 F.3d 1582 (9th Cir. 1996) (evaluated both plea and sentencing proceedings in concluding district court's failure to advise defendant of inability to withdraw plea if court rejected government's recommendation was harmless because court accepted that recommendation; thus, defendant received what he bargained for); United States v. Rivera-Ramirez, 715 F.2d 453 (9th Cir. 1991) (evaluated plea and sentencing proceedings in concluding failure to advise defendant of minimum possible special parole term harmless error where defendant was advised of maximum life term of special parole and sentenced to life term of special parole following incarceration); United States v. Sanclemente-Bejarano, 861 F.2d 206 (9th Cir. 1988) (evaluated plea and sentencing proceedings in concluding failure to advise defendant of maximum penalty was harmless error where defendant was advised of possibility of penalty ultimately imposed); Rule 11, 1983 Advisory Committee Notes ("it is fair to say that the kinds of Rule 11 violations which might be found to constitute harmless error upon direct appeal are fairly limited, as in such instances the matter must be resolved solely on the basis of the Rule 11 transcript and the other portions (e.g., sentencing hearing) of the limited record in such cases") (internal quotations omitted).

Thus, the "split" between the Ninth and other circuits identified by the government is

illusory. Indeed, none of the cases cited by government demonstrate a circuit split regarding the scope of appellate review in assessing the harmlessness of Rule 11(c)(3) errors.

First, the government cites the Eleventh Circuit's decision in United States v. Jones, 143 F.3d 1417, 1420 (11th Cir. 1998), where the court considered the contents of a written plea agreement in assessing whether the defendant's substantial rights were affected by a Rule 11 deficiency in advising the defendant of the mandatory minimum sentence that would result from his conviction. Cert. Pet. 19. The Eleventh Circuit observed that "[w]hen reviewing a district court's Rule 11 plea colloquy to ensure that the three core principles of Rule 11 were not infringed, we rely 'solely on the basis of the record of the Rule 11 proceedings' . . . Thus, if the record of the plea colloquy does not show compliance with the three core principles of Rule 11, the defendant must be permitted to withdraw his plea." Id. at 1420. The court then concluded that the written plea agreement, filed with the district court at the plea hearing, was part of the record of that proceeding. Id. (internal citations omitted).

Similarly, the government cites the Second Circuit's decision in Maher, 108 F.3d 1513. Cert. Pet. at 19. But again the Ninth Circuit's decision in Vonn in no way conflicts with Maher. In Maher, the Second Circuit held that any deficiency in the district court's explanation of the nature of the charges was harmless because the record pertaining to the defendant's guilty plea demonstrated his understanding of those charges. Id. at 1524. Specifically, the court assessed the plea colloquy, as well as the contents of written plea agreements and written petitions to enter guilty pleas that were filed on the day of the plea proceeding. Id. at 1521-24. Thus, the court of appeals considered only the record pertaining to the plea proceeding. The court did not -- as the government urged the Ninth Circuit to do in Vonn -- consider any court proceedings not

temporally relevant to the defendants' understandings at the time they entered their respective guilty pleas.

The government also relies on Lovett, 844 F.2d at 492, where -- it contends -- the Seventh Circuit held harmless the district court's failure to advise the defendant of his right to assistance of counsel at trial in light of a written plea agreement. Cert. Pet. 19. But the government has misread the Lovett decision. In Lovett, the Seventh Circuit deemed harmless the district court's failure to advise the defendant of his right to assistance of counsel because the record of the plea colloquy otherwise demonstrated the defendant's knowledge of that right. Id. at 491-92 (noting district court explained that, at trial, defendant's "attorney could cross-examine the witnesses for the government, object to evidence offered by the government and offer evidence on [his] behalf"). The court noted also that "in any event, there is no suggestion in the record that Lovett did not know about his right to counsel at trial," because he had never alleged this lack of knowledge. Id. at 492.

The government's reliance on the Fifth Circuit's decision in Johnson, 1 F.3d at 302, is similarly misplaced. In Johnson, the court assessed the harmlessness of the district court's failure during the plea proceedings to inform the defendant of a one-year mandatory minimum that his conviction would invoke. Id. The court noted that it would conduct its review of a Rule 11 challenge "solely on the basis of the record on appeal--principally the transcript of the plea colloquy hearing but also other portions of the record, such as any written plea agreement, the transcript of the sentencing hearing, and the sentence actually imposed." Id. at 298. But the court cautioned that it would review post-plea colloquy sources only to the extent they are "temporally relevant to the voluntary and uncoerced nature of the defendant's guilty plea, and to

his knowledge and understanding of the nature of the charges and consequences of his plea." Id. (emphasis added). Thus, in light of the alleged Rule 11 error, which pertained to sentencing, the court assessed only the plea colloquy and sentencing proceeding. Id. at 299-302. The court concluded that the district court's failure to advise the defendant of the one-year mandatory minimum penalty before accepting his guilty plea was harmless in light of the fact that the plea colloquy revealed that he understood that his plea would result in a minimum sentence of 21 years' incarceration. Id.

Indeed, the only case cited by the government that reveals any divergence from the approach taken by the Ninth and other circuits, which permit consideration of only temporally relevant proceedings in evaluating the harmless of Rule 11 errors is the D.C Circuit's decision in Lyons, 53 F.3d 1321. But even in Lyons, the court's reliance on non-plea-related proceedings was minimal and not dispositive; indeed, the court justified such reliance on the fact that other factors also supported a finding of harmlessness. Id. at 1322-23 (harmless error in advising defendant of $250 maximum fine -- as opposed to actual $250,000 maximum fine -- where defendant properly advised of fine amount at arraignment and did not object to finding in presentence report of $250,000 maximum fine nor object or react with surprise at sentencing to imposition of $135,000 fine).

Accordingly, to the extent any split exists between the circuits in assessing the scope of its review of Rule 11 errors, it is extremely shallow. Indeed, considering the factual complexity of Rule 11 analysis and the myriad of factual and legal permutations thus posed in Rule 11 appeals, the circuits have adopted and applied a remarkably unified standard of analysis. Thus, Supreme Court review is unwarranted at this time.

CONCLUSION

The petition for a writ of certiorari should be denied based on (1) the government's failure to preserve the issues regarding the standard of review that applies to Rule 11 errors raised for the first time on appeal and the definition of "harmless error" under Rule 11(h); (2) the fact that, regardless of whether the circuits follow plain or harmless error review, the analysis reduces to the same inquiry; indeed, despite reviewing the Rule 11(c)(3) error at issue for harmlessness under Rule 11(h), the court of appeals in Vonn never cited the government's burden of persuasion in deciding to vacate the pleas; (3) the circuits are not split on the general issue regarding the scope of review in assessing the harmlessness of a Rule 11 error, in particular, a Rule 11(c)(3) error; and (4) the case is factually unique in that (a) the issues arise in the context of two guilty plea proceedings and a motion to withdraw the plea to one of the two counts to which he pled in the second proceeding, and (b) the government objected to the Rule 11(c)(3) error in the plea proceeding pertaining to two of the three counts and thus gave the court the opportunity to correct its mistake; hence, the traditional considerations that warrant plain error review are not at issue.

Respectfully submitted,

MARIA STRATTON
Federal Public Defender
EMILY S. UHRIG
Deputy Federal Public Defender

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EMILY S. UHRIG
Deputy Federal Public Defender